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FIBER TECHNOLOGIES NETWORKS, L.L.C.)	
140 Allens Creek Road)	
Rochester, NY 14618)	
)	
Complainant,)	
)	
v.)	D.T.E. 01-70
)	
TOWN OF SHREWSBURY ELECTRIC)	
LIGHT PLANT)	
100 Maple Avenue)	
Shrewsbury, MA 01545-5398)	
)	
Respondents.)	
)	

Fiber Technologies Networks, L.L.C. (“Fibertech”) opposes the motion of Shrewsbury’s Electric Light Plant (“SELP”) to compel Fibertech to respond to certain information requests. These requests, set out in full in SELP’s motion and attached below, seek information about Fibertech’s business that one way or another will not shed light on the issues before the Department in this case.

SELP has denied Fibertech access to its poles on the purported basis that a dark fiber carrier cannot be a licensee within the meaning of G.L. c.166 §25A. *See Response of Shrewsbury's Electric Light Plant* (filed September 17, 2001) ¶28 (“SELP specifically denies that Fibertech’s business of leasing dark fiber constitutes a ‘telecommunications service’ or that Fibertech actually ‘transmits’ intelligence by telephone or electricity”); further answer ¶ 4 (“Fibertech is not incorporated for the transmission of intelligence by electricity or telephone

because ‘[d]ark fiber’ means fiber that is not connected to any equipment capable of transmitting information”); ¶ 7(Fibertech is not a “licensee” because it “does not offer its dark fiber ‘service’ to the general public”); ¶ 8 (“Fibertech is not a ‘licensee’ within the meaning of G.L. c. 166, §25A and C.M.R. 45.02”). That Fibertech is a dark fiber provider is an established fact in this proceeding: it is stated in Fibertech’s complaint,¹ acknowledged in SELP’s pleadings,² and asked and answered in several SELP information requests.³ SELP nevertheless seeks information concerning Fibertech’s agreements with its customers (Requests 1-6, 1-7, and 1-8) and any prospective business plans to expand from offering dark fiber (Requests 1-12 and 1-13).

These requests present a threshold issue that goes to the scope of this proceeding. While SELP contends that a dark fiber provider is per se disqualified as a “licensee” for purposes of G.L. c.166 §25A, Fibertech contends that the facts dispositive are (1) that its fiber optic cable is for transmission of telecommunications, or (2) that it is authorized as a common carrier pursuant to G.L. c. 159 § 12 by virtue of meeting the DTE’s entry requirements. Although Fibertech can demonstrate if necessary that its services are an important segment of the competitive marketplace 220 C.M.R. 45.00 is meant to foster and that SELP’s exclusion of Fibertech is blatantly anticompetitive and discriminatory, Fibertech also believes the case can be resolved on the narrower issues. If so – if SELP is right or Fibertech is right in these contentions – there is no need to reach additional factual issues (as SELP argued with respect to the procedural

¹ *Complaint of Fiber Technologies Networks, L.L.C.*, DTE 01-70, ¶¶ 4, 8. 26-29 (filed Aug. 27, 2001).

² *Response of Shrewsbury’s Electric Light Plant*, DTE 01-70, ¶¶ 2, 21, 28, allegation ¶ 4 (filed Sept. 17, 2001). See also *Shrewsbury’s Electric Light Plant’s Comments on Proposed Procedural Schedule, Scope of Proceedings and Opposition to Motion of Fiber Technologies Networks, L.L.C. To Change The Order of Presentation*, DTE 01-70, pp. 1,4 (filed Oct. 22, 2001).

³ See *First Set of Information Requests by Shrewsbury’s Electric Light Plant*, DTE 01-70, SELP 1-6, 1-7, 1-15 (filed Nov. 2, 2001); *Second Set of Information Requests by Shrewsbury’s Electric Light Plant*, DTE 01-70, SELP 2-7, 2-8, 2-9 (filed Nov. 16, 2001).

schedule⁴). The arrangements between Fibertech and its present customers in New York and Connecticut or the basis on which Fibertech may offer voice, data, or cable television services on a retail basis in the future do not alter the undisputed operative fact that Fibertech is currently a wholesale provider of dark fiber and has sought pole attachments in Massachusetts on that basis.

In any event, SELP does not make any concrete demonstration of how the information sought by these requests is relevant. SELP's motion to compel these documents argues that customer agreements may shed light on Fibertech's business plans, but SELP's argument fails to make a connection between any such facts and the contentions SELP makes in this case. For example, SELP states in its motion to compel, "SELP would be interested in learning whether these leases (or agreements or contracts) require Fibertech's 'customers' to make payment or take service as of the date of execution of the contract, or at some later date." Although the requested leases (or agreements or contracts) may be interesting to SELP, SELP makes no connection between the information it seeks and the issues of this case. It does not show how any set of facts it might hope to discover makes it more or less likely that Fibertech is a "licensee" for purposes of G.L. c.166 §25A.

Like SELP's actions in denying Fibertech pole attachments, its information requests at issue appear designed to second-guess the Department's entry requirements for competitive carriers. In establishing an entry threshold of a Statement of Business Operations and tariff filing, the Department concluded that "elimination of entry regulation will promote additional competition in Massachusetts and thus provide benefits to consumers." *Entry Deregulation*, D.P.U. 93-98 at p. 7 (1994). Thus, the Department did away with certification proceedings reviewing each carrier's qualifications. It declared that "[a]ny common carrier that has an

⁴ See also, *Shrewsbury's Electric Light Plant's Comments on Proposed Procedural Schedule, Scope of Proceedings and Opposition to Motion of Fiber Technologies Networks, L.L.C. To Change The Order of Presentation*, DTE 01-70, pp. 1-3 (filed Oct. 22, 2001).

approved tariff on file with the Department, and that has submitted a Statement of Business Operations, will be considered a ‘registered’ common carrier in the Department's new framework.” *Id.* Here, however, SELP has injected itself as the arbiter of Fibertech’s entry. Now that SELP’s nullification and interposition is being challenged, it wants to convert this proceeding into a form of certification proceeding; it apparently seeks to challenge Fibertech’s bona fides as a common carrier in Massachusetts based on its agreements in New York and Connecticut.

Any relevance of the requested documents is at most collateral to this case. SELP’s requests are attempting to use background information about Fibertech to divert the Department’s focus from the issues of this case. Simply because customers or plans are mentioned in Mr. Chiaino’s testimony as background explanation of Fibertech’s business plan as a dark fiber carrier does not make them relevant for discovery. By comparison, the pre-filed testimony of Thomas R. Josie refers to the number of SELP’s electric and cable customers as part of the general description of SELP and Mr. Josie’s duties.⁵ By this measure, SELP itself has “placed in issue” these customers, and Mr. Josie’s testimony supports a digression into SELP’s relationship with these customers. The point of Fibertech’s burden and confidentiality objections is that inquiry into the facts about Fibertech’s relationship with its customers is at best a sideshow that simply does not warrant the effort involved. In pursuing its motion to compel, SELP seems not only to be promoting this sideshow, but is also injecting the prospect of delay in the proceedings.

Among other things, as reflected in Fibertech’s objections, these documents involve confidential and proprietary information. Customer agreements contain confidentiality

⁵ *Prepared Direct Testimony of Thomas R. Josie on behalf of Shrewsbury’s Electric Light Plant* at p. 2 (filed Nov. 16, 2001).

provisions that limit disclosure; they are competitively sensitive in the hands of competitors to these customers and of competitors to Fibertech. One such competitor is SELP, which has fiber optic cable of its own. Thus, as SELP acknowledged by agreeing to a protective order, the information it seeks requires the additional administrative burden of protective treatment with no material gain to any fact finding that may be necessary.

Under the Department's rules, "discovery is intended to reduce hearing time, narrow the scope of issues, protect the rights of the parties, and ensure that a complete and accurate record is compiled." 220 C.M.R. 1.06(6)(c)(1). The discovery that SELP seeks instead is calculated to expand the issues and increase hearing time.

CONCLUSION

For all of the reasons set forth above, Fibertech requests that the Department deny SELP's request to compel Fibertech to respond completely to the above-listed information requests. In the alternative, if Fibertech is compelled to respond to such information requests, Fibertech seeks a nondisclosure agreement from SELP and protective treatment. Fibertech respectfully seeks expedited treatment of this issue by the Department in order to prevent jeopardizing the existing procedural schedule in this case.

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